

# **EXHIBIT 5**

<p>1 UNITED STATES DISTRICT COURT</p> <p>2 FOR THE EASTERN DISTRICT OF VIRGINIA</p> <p>3 Richmond Division</p> <p>4 -----x</p> <p>5 ePLUS, iNC., )</p> <p>6 Plaintiff, )</p> <p>7 v. ) Civil Action No.</p> <p>8 LAWSON SOFTWARE, INC., ) 3:09-cv-620(REP)</p> <p>9 Defendant. )</p> <p>10 -----x</p> <p>11</p> <p>12 VIDEOTAPED DEPOSITION OF</p> <p>13 ERNEST BAINBRIDGE LIPSCOMB, III, ESQUIRE</p> <p>14 Washington, DC</p> <p>15 Friday, June 18, 2010</p> <p>16 9:53 a.m.</p> <p>17</p> <p>18</p> <p>19</p> <p>20 Job No.: 1-181073</p> <p>21 Pages 1 - 111</p> <p>22 Reported By: Joan V. Cain</p>	<p>1 A P P E A R A N C E S</p> <p>2</p> <p>3 ON BEHALF OF PLAINTIFF:</p> <p>4 MICHAEL G. STRAPP, ESQUIRE</p> <p>5 GOODWIN PROCTER, LLP</p> <p>6 Exchange Place</p> <p>7 Boston, Massachusetts 02109</p> <p>8 Telephone: (617) 570-1000</p> <p>9</p> <p>10 ON BEHALF OF DEFENDANT:</p> <p>11 JOSHUA P. GRAHAM, ESQUIRE</p> <p>12 MERCHANT &amp; GOULD</p> <p>13 3200 IDS Center</p> <p>14 80 South Eighth Street</p> <p>15 Minneapolis, Minnesota 55402-2215</p> <p>16 Telephone: (612) 332-5300m</p> <p>17</p> <p>18 ALSO PRESENT:</p> <p>19 Akim Graham, Videographer</p> <p>20</p> <p>21</p> <p>22</p>
<p>1 Videotaped Deposition of ERNEST BAINBRIDGE</p> <p>2 LIPSCOMB, III, ESQUIRE, held at the law offices of:</p> <p>3</p> <p>4 GOODWIN PROCTER, LLP</p> <p>5 901 New York Avenue, Northwest</p> <p>6 Washington, DC 20001</p> <p>7 (202) 346-4000</p> <p>8</p> <p>9 Pursuant to Notice, before Joan V. Cain,</p> <p>10 Court Reporter and Notary Public in and for the</p> <p>11 District of Columbia.</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p>1 C O N T E N T S</p> <p>2</p> <p>3 EXAMINATION OF ERNEST B. LIPSCOMB, III PAGE</p> <p>4 By Mr. Strapp 6</p> <p>5 By Mr. Graham 103</p> <p>6</p> <p>7 E X H I B I T S</p> <p>8 (Attached to the Transcript.)</p> <p>9 LIPSCOMB DEPOSITION EXHIBITS PAGE</p> <p>10 Exh. 1 Rebuttal Expert Report of Ernest B. 12</p> <p>11 Lipscomb, III</p> <p>12 Exh. 2 Gartner Research Publication Paper, 64</p> <p>13 Bates No'd ePlus 0940869 through '871</p> <p>14 Exh. 3 ComputerWorld Article Entitled EPlus 67</p> <p>15 Charges SAP with Patent Infringement,</p> <p>16 Bates No'd ePlus 940878</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>

<p style="text-align: right;">45</p> <p>1 reexamination proceeding have the same evidentiary</p> <p>2 burden of clear and convincing evidence that Lawson</p> <p>3 would to present -- in presenting invalidity to show</p> <p>4 a basis for rejection?</p> <p>5 <b>A The examiner doesn't have a standard of</b></p> <p>6 <b>clear and convincing. He just applies the</b></p> <p>7 <b>references. It's an obviousness standard or</b></p> <p>8 <b>anticipation or whatever.</b></p> <p>9 Q Do you want to take a break for a few</p> <p>10 minutes?</p> <p>11 MR. GRAHAM: Sure.</p> <p>12 THE VIDEOGRAPHER: Going off the record.</p> <p>13 The time is 10:43 a.m.</p> <p>14 (Recess.)</p> <p>15 THE VIDEOGRAPHER: Back on the record. The</p> <p>16 time is 10:47 a.m.</p> <p>17 BY MR. STRAPP:</p> <p>18 Q Mr. Lipscomb, we were talking about Seagate</p> <p>19 technology and the standard that it was set --</p> <p>20 that's set for willfulness in that case. Is it your</p> <p>21 understanding that the standard for willfulness</p> <p>22 announced in the Seagate case in 2007 is the current</p>	<p style="text-align: right;">47</p> <p>1 <b>be years ago that if you didn't rely on your opinion</b></p> <p>2 <b>of counsel, then you were very likely to be held to</b></p> <p>3 <b>be willful -- a willful infringer. I think Seagate</b></p> <p>4 <b>sort of overturned that, that willfulness was not</b></p> <p>5 <b>predicated on opinion from counsel.</b></p> <p>6 Q But you would agree that if a party is</p> <p>7 going to invoke the opinion of counsel as a sword,</p> <p>8 so to speak, it cannot withhold that opinion of</p> <p>9 counsel by refusing to waive the attorney-client</p> <p>10 privilege?</p> <p>11 <b>A I would agree with that.</b></p> <p>12 Q Could you turn to paragraph 30 of your</p> <p>13 report on page 15, please. Now, you had mentioned</p> <p>14 earlier today that the opinion of counsel can be one</p> <p>15 of the factors in the totality of factors test to --</p> <p>16 <b>A Yes.</b></p> <p>17 Q -- determine whether a party was</p> <p>18 objectively reckless in continuing to practice -- or</p> <p>19 continuing to use products accused of infringement,</p> <p>20 correct?</p> <p>21 <b>A Yes.</b></p> <p>22 Q And are you specifically opining in this</p>
<p style="text-align: right;">46</p> <p>1 applicable standard for willfulness?</p> <p>2 <b>A Yes.</b></p> <p>3 Q Are you familiar with the portion of</p> <p>4 Seagate that discusses the issue of waiver of the</p> <p>5 attorney-client privilege with respect to opinion</p> <p>6 counsel and trial counsel?</p> <p>7 <b>A I read the entire case, but I don't really</b></p> <p>8 <b>remember the specifics of that part.</b></p> <p>9 Q Well, let me ask you generally. Are you --</p> <p>10 are you familiar with the principle that a party is</p> <p>11 not allowed to use the attorney-client privilege as</p> <p>12 both a sword and shield with respect to opinions of</p> <p>13 counsel?</p> <p>14 <b>A I would agree with that.</b></p> <p>15 Q So would you agree then also that a party</p> <p>16 cannot use its opinion of counsel simultaneously to</p> <p>17 gain an advantage while invoking the privilege to</p> <p>18 prevent the other party from reviewing portions of</p> <p>19 the opinion of counsel?</p> <p>20 <b>A My understanding is that that the current</b></p> <p>21 <b>law from Seagate is that you do not have to provide</b></p> <p>22 <b>opinions of counsel, and that does not -- it used to</b></p>	<p style="text-align: right;">48</p> <p>1 instan- -- in this case that Lawson's opinion of</p> <p>2 counsel was one of the factors that you were relying</p> <p>3 upon in reaching your conclusion that Lawson was not</p> <p>4 objectively reckless in continuing to prac- --</p> <p>5 continuing to use the products accused of</p> <p>6 infringement?</p> <p>7 <b>A Yes.</b></p> <p>8 Q When did Lawson obtain the opinion of</p> <p>9 counsel that you are aware of?</p> <p>10 <b>A It's my understanding that they obtained</b></p> <p>11 <b>opinion of counsel shortly after suit was filed.</b></p> <p>12 Q And who drafted that opinion of counsel?</p> <p>13 <b>A I have no idea. I didn't.</b></p> <p>14 Q And what did the opinion of counsel say?</p> <p>15 MR. GRAHAM: Objection, foundation.</p> <p>16 THE WITNESS: I have no idea. Never read</p> <p>17 the opinion.</p> <p>18 BY MR. STRAPP:</p> <p>19 Q Do you know who wrote the opinion?</p> <p>20 <b>A You just asked me that.</b></p> <p>21 Q I did. You're right.</p> <p>22 <b>A See, I listen. I try to.</b></p>

<p style="text-align: right;">49</p> <p>1 Q You don't know who wrote the opinion and</p> <p>2 you don't know what the opinion said. Do you know</p> <p>3 anything at all about the contents of the opinion?</p> <p>4 A No.</p> <p>5 Q Who informed you that there was an opinion</p> <p>6 of counsel?</p> <p>7 A It was either Kristin -- Kirstin or Peter</p> <p>8 Gergely.</p> <p>9 Q So they told you there's an opinion of</p> <p>10 counsel but they didn't tell you who wrote the</p> <p>11 opinion --</p> <p>12 A No.</p> <p>13 Q -- or what it contained?</p> <p>14 A That's correct.</p> <p>15 Q But they did tell you that it was received</p> <p>16 after litigation began?</p> <p>17 A That's correct.</p> <p>18 Q Now, how is it that an opinion of counsel</p> <p>19 about which you have no knowledge at all can be, in</p> <p>20 your opinion, one of the bases for a finding that</p> <p>21 Lawson was not objectively reckless here?</p> <p>22 A An opinion of counsel, presumptively it's</p>	<p style="text-align: right;">51</p> <p>1 one way or the other about whether this opinion of</p> <p>2 counsel found that Lawson was infringing or not</p> <p>3 infringing the products -- the patents, correct?</p> <p>4 MR. GRAHAM: Object. Objection, asked and</p> <p>5 answered.</p> <p>6 THE WITNESS: I have no knowledge of what</p> <p>7 the opinion says one way or the other. I just</p> <p>8 cannot conceive of counsel writing an opinion and</p> <p>9 saying guys, you're infringing. Stop.</p> <p>10 BY MR. STRAPP:</p> <p>11 Q Well, wouldn't you ask to see the opinion</p> <p>12 of counsel if it was going to form part of the basis</p> <p>13 of your opinion that there wasn't objectively</p> <p>14 reckless -- that -- that Lawson didn't act</p> <p>15 objectively reckless here?</p> <p>16 A I missed the first part of that question.</p> <p>17 Q Wouldn't it make sense, in your opinion, to</p> <p>18 ask Merchant &amp; Gould for a copy of the opinion of</p> <p>19 counsel to actually read it before you -- before you</p> <p>20 reached the conclusion that that opinion of counsel</p> <p>21 could be a basis for finding that Lawson was not</p> <p>22 objectively reckless?</p>
<p style="text-align: right;">50</p> <p>1 the opinion of counsel is that it's either invalid</p> <p>2 or no infringement, presumptively, and that being</p> <p>3 the case, it certainly would be a factor.</p> <p>4 Q Well, you say presumptively the opinion of</p> <p>5 counsel is either invalid or no infringement, but</p> <p>6 you don't know -- you don't know that, right?</p> <p>7 A I've been doing this for almost 45 years</p> <p>8 and I've never seen an opinion of counsel that says,</p> <p>9 guys, we're infringing and the patent's valid, so we</p> <p>10 better stop.</p> <p>11 Q So you assume that when someone gets an</p> <p>12 opinion of counsel, it's going to say what they want</p> <p>13 it to say?</p> <p>14 A No. I assume that it's going to say what</p> <p>15 counsel believes, what his opinion is in the case.</p> <p>16 Q And you assume that his opinion is going to</p> <p>17 be what the Merchant &amp; Gould attorneys wanted it to</p> <p>18 be?</p> <p>19 A I don't know whether Merchant &amp; Gould is</p> <p>20 involved with that opinion or not, so I don't -- I</p> <p>21 don't know how to answer that.</p> <p>22 Q Okay. But you have absolutely no knowledge</p>	<p style="text-align: right;">52</p> <p>1 A I would say that opinions of counsel always</p> <p>2 can be, assuming they don't say, guys, stop, would</p> <p>3 be a factor.</p> <p>4 Q So wouldn't it make sense for you to look</p> <p>5 at the opinion of counsel to make sure that it</p> <p>6 doesn't say, guys, stop?</p> <p>7 A Not necessarily.</p> <p>8 Q Why not?</p> <p>9 A Why?</p> <p>10 Q Because you don't know what it says.</p> <p>11 A I presume what it says in the sense that it</p> <p>12 doesn't say, you know, guys, you need to stop. I</p> <p>13 mean, nobody does that.</p> <p>14 Q Well, why didn't you ask -- if you're not</p> <p>15 going to ask to actually see it, why didn't you ask</p> <p>16 the Merchant &amp; Gould attorneys what it said?</p> <p>17 A Well, there wasn't any reason to because</p> <p>18 it's -- it's still a factor. It is a factor. It</p> <p>19 can be -- if it says, guys, you're infringing, stop,</p> <p>20 that's a factor also.</p> <p>21 Q Correct.</p> <p>22 A That's all.</p>